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JUL 1 6 2004

OFFICE OF PETITIONS

In re Application of :
Muller, et al. : ON PETITION
Application No. 10/603,997 :
Docket No.: Bayer 10.019.2 REI :

This is a decision on the "PETITION UNDER 37 CFR § 1.17(h) - NOTICE TO FILE CORRECTED APPLICATION PAPERS," filed April 5, 2004, wherein petitioner alleges "the originally filed items were in fact deposited with the USPTO." This petition is being treated as a petition to accord the above-identified application a filing date of November 25, 2003.

The petition is **DISMISSED**.

The application was received by the USPTO on June 25, 2003. On September 5, 2003, a Notice of Incomplete Reissue Application was mailed indicating, *inter alia*, that the application had not been accorded a filing date because the specification was missing and the application did not include at least one claim in accordance with 35 USC 112. The Notice indicated that the filing date would be the date of receipt of the required specification and at least one claim. Any assertion that the specification and at least one claim were submitted or were not necessary for a filing date must be by way of petition and petition fee.

Submitted in response to the Notice of Incomplete Reissue Application was, *inter alia*, a specification, including claims. On February 9, 2004, a Notice to File Corrected Application Papers was mailed. The Notice to File Corrected Application Papers indicated the application had been accorded a filing date of November 5, 2003, but that pages 407-408 of the specification appeared to have been omitted. The Notice to File Corrected Application Papers permitted applicant to either: (1) promptly establish prior receipt in the PTO of the omitted items at issue (generally by way of a date-stamped postcard receipt (MPEP 503)), or (2) promptly submit the omitted item(s) in a and accept the date of such submission as the application filing

date. An applicant asserting that the items in question were in fact deposited in the PTO with the application papers must file a petition (and the appropriate petition fee) with evidence of such deposit. An applicant desiring to submit the omitted items and accept the date of such submission as the application filing date must file any omitted items with an oath or declaration in compliance with 37 CFR 1.63 and 1.64 referring to such items and a petition under 37 CFR 1.182 (with the petition fee under 37 CFR 1.17(h)) requesting the later filing date within two months of the date of the Notice (37 CFR 1.181(f)).

Petitioner argues that the postcard date stamped November 5, 2003 by the USPTO serves as evidence of the submission of a complete application on November 5, 2003, including pages 407-408.

The argument and evidence submitted by petitioner have been considered, but are not persuasive. The USPTO file is the official record of the papers originally filed in this application. An applicant alleging that a paper was filed in the Office and later misplaced has the burden of proving the allegation by a preponderance of the evidence.

A review of the official file reveals that the application as submitted June 25, 2003 lacked a specification and at least one claim. Further review of the official application file reveals that pages 1-406 and pages 409-412 of the specification were submitted on November 25, 2003. There is no indication in the official application file that pages 407-408 were submitted. Moreover, a copy of pages 407-408 has not been submitted with the instant petition.

Petitioner states that "[a]fter reviewing the applicants' file, pages 407-408 were included in the applicants' filed papers of 5 November 2003." The fact that petitioner believes the application included pages 407-408 is not more persuasive than the actual papers shown to have been received by the official file. The Office has a well established and well publicized practice of providing a receipt for papers filed in the Office to any applicant desiring a receipt. The practice requires that any paper for which a receipt is desired be filed in the Office with a self-addressed postcard identifying the paper. A postcard receipt that itemizes and properly identifies the papers that are being filed serves as *prima facie* evidence of receipt in the Office of all the items listed thereon on the date stamped thereon by the Office. See section 503, Manual Of Patent Examining Procedure (MPEP 503).

In accordance with MPEP 503, a properly itemized postcard should include applicant's name(s); title of invention; number of pages of specification, claims (for nonprovisional applications), and sheets of drawing; whether oath or declaration is included; a list of any additional forms included with the application (e.g., application transmittal form, application data sheet, fee transmittal form, and /or provisional application cover sheet); and amount and manner of paying the fee.

Petitioner's postcard fails to specifically itemize the number of pages of specification submitted therefore it cannot be concluded that the specification as submitted on November 5, 2003 included pages 407-408.

Any renewed petition should be accompanied by evidence to sufficiently establish receipt in the USPTO of the items in question as well as a copy of the omitted items, i.e., pages 407-408.

Any request for reconsideration should be filed within **TWO MONTHS** of the mailing date of this decision in order to be considered timely. 37 CFR 1.181(f). This time period may not be extended pursuant to 37 CFR 1.136.

Further correspondence with respect to this matter should be addressed as follows:

By mail:

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Telephone inquiries related to this decision may be directed to the undersigned at (703) 305-0310.


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